

TO: Mike McGowan, Chair
Members of the Delta Protection Commission

FROM: Linda Fiack, Executive Director
Dan Siegel, Supervising Deputy Attorney General

DATE: February 22, 2007

SUBJECT: Findings and Analysis of the Delta Protection Commission (Commission)
Concerning Appeals Filed on November 3, 2007 by (1) The Natural Resources
Defense Counsel and (2) The Concerned Citizens of Clarksburg, ET AL.

RECOMMENDED ACTIONS

A. Adopt the findings and analysis set forth below. The findings and analysis explain the basis for the Commission's determination that the Clarksburg Old Sugar Mill Specific Plan and related documents (OSMSP), as approved by the Yolo County Board of Supervisors (County) on October 24, 2006, are consistent or not consistent with the following policies of the Commission's Land Use and Resource Management Plan for the Primary Zone of the Delta (Resource Management Plan) and related provisions in the Delta Protection Act (Act):

Consistent:

Agriculture Policy 4; Land Use Policy 2; Land Use Policy 7; Utilities and Infrastructure Policy 3; Levees Policy 1; Levees Policy 2; Levees Policy 4 and Levees Policy 5.

Not Consistent:

Land Use Policy 3; Land Use Policy 4; and Levees Policy 3.

B. Remand this matter to the County for its reconsideration.

RECOMMENDED MOTION:

"I hereby move that the Commission adopt the Findings and Analysis set forth in the February 22, 2007 staff report concerning the OSMSP and that the Commission remand this matter to Yolo County for its reconsideration."

REASON FOR RECOMMENDED ACTIONS

The recommended actions would assure the Commission's compliance with its regulations and the Act by fulfilling its role as an appeal body when an action taken by a local entity on a development project in the Primary Zone of the Delta is appealed to the Commission by a Third Party.

FINDINGS AND ANALYSIS OF THE DELTA PROTECTION COMMISSION CONCERNING APPEALS FILED ON NOVEMBER 3, 2006 BY (1) THE NATURAL RESOURCES DEFENSE COUNSEL AND (2) THE CONCERNED CITIZENS OF CLARKSBURG, ET AL.

Introduction

Upon adoption by the Commission, this document shall constitute the findings and analysis of the Commission concerning two appeals challenging the October 24, 2006 decision of the County to approve the OSMSP. Both appeals were filed with the Commission on November 3, 2006. One appeal was filed by the Natural Resources Defense Council; the other was filed by the Concerned Citizens of Clarksburg and other parties.

Pursuant to the Commission's applicable regulation (Cal. Code Regs., tit. 14, § 20008), it has heard the appeals in two phases.

First, it held a hearing on November 16, 2006, its first available meeting following the filing of the appeals, to determine whether the appeals fall within the Commission's jurisdiction and raise an appealable issue. At that hearing, the Commission determined that the appeals do fall within the Commission's jurisdiction because the OSMSP would constitute "development" within the "primary zone" of the Delta pursuant to the Act. The Commission further determined that the appeals each raise at least one appealable issue under the Act.

The Commission therefore proceeded to the second hearing phase and heard the merits of the appeals on January 25, 2007, its next regularly-scheduled meeting. At that meeting, the Commission determined that the challenged actions of the County were inconsistent with three policies in the Commission's Resource Management Plan, and related policies in the Act.

The Commission directed staff to prepare written findings, consistent with its determination, and to present the findings to the Commission on February 22, 2007, its next regularly-scheduled meeting.

The detailed history of the OSMSP, approvals by the County and the appeals is provided in staff reports to the Commission dated November 7, 2006 and January 25, 2007 (**Attachment A**).

Background

The Primary Zone of the Sacramento-San Joaquin Delta includes approximately 500,000 acres of waterways, levees and farmed lands extending over portions of five counties: Solano, Yolo, Sacramento, San Joaquin and Contra Costa. This area supports a strong agricultural economy along with open space and habitat values. Recognizing the threats to the Primary Zone of the Delta from potential urban and suburban encroachment, and the need to protect the area for agriculture, wildlife habitat, and recreation uses, the California Legislature passed, and the Governor signed into law on September 23, 1992, the Delta Protection Act of 1992 (SB 1866).

The Act finds and declares in part that "[t]he delta is an agricultural region of great value to the state and nation . . ." and that ". . . the continued dedication and retention of that delta land in agricultural production contributes to the preservation and enhancement of open space and habitat values." (Pub. Resources Code, § 29703, subd. (a), (b).) The Legislature further finds in

part that “. . . the delta is inherently a flood prone area wherein the most appropriate land uses are agriculture, wildlife habitat, and, where specifically provided, recreational activities” (Pub. Resources Code, § 29704.) “In order to protect regional, state, and national interests in the long-term agricultural productivity, economic vitality, and ecological health of delta resources, it is important that there be coordination and integration of activities by the various agencies whose land use activities and decisions cumulatively impact the delta.” (Pub. Resources Code, § 29709, subd. (b).)

The policies of the Act are implemented in part through the Legislature’s determination that “[r]egulation of land use and related activities that threaten the integrity of the delta’s resources can best be advanced through *comprehensive regional land use planning* implemented through reliance on local government in its local land use planning procedures and enforcement.” (Pub. Resources Code, § 29709, subd. (b) (italics added).) Therefore, the statute establishes a 23-member Delta Protection Commission, and directs the Commission to adopt “. . . a comprehensive long-term resource management plan for land uses within the primary zone of the delta” (Pub. Resources Code, §§ 29735, 29760, subd. (a).)

The Commission adopted the statutorily required plan, “Land Use and Resource Management Plan for the Primary Zone of the Delta,” on February 23, 1995. (Cal. Code Regs., tit. 14 § 20000 et seq.) The Act requires that local governments listed in the Act, including the County, may approve “development” in the “primary zone” of the delta only if it is consistent with the Resource Management Plan and the Act. (*See* Pub. Resources Code, §§ 29763.5, 29765, 29770, subd. (a), 29771.) The Act further provides that “(a)ny person who is aggrieved by any action taken by a local government or other local agency in implementing the Resource Management plan, or otherwise taken pursuant to this division, may file an appeal with the Commission. (Id., §29770. (a).)

Jurisdiction and Appealability

On November 16, 2006, the Commission conducted a hearing, pursuant to California Code of Regulations, title 14, section 20008, and determined that it has jurisdiction over this matter because (1) the project location is in the Primary Zone of the Delta (unanimous) and (2) the project constitutes "development" (15 for/1 opposed). It also determined that both of the appeals include appealable issues (unanimous). The Commission’s determination of jurisdiction and appealability is based on the record, including submissions of staff and of the parties, testimony, and other evidence presented at the public hearing. The analytical basis for the Commission’s determination is set forth in the November 7, 2006, letter (staff report) from Supervising Deputy Attorney General Daniel L. Siegel to the Commission. The letter was provided to the parties to the appeals and made available to the public prior to the hearing, and the Commission hereby incorporates that letter into its current findings.

Merits

Based upon the evidence presented during its public hearing on January 25, 2007, including all communications, reports, staff memoranda and other materials that were made part of the hearing record, the Commission makes the following findings as to whether the County’s actions regarding the OSMSP are, or are not, consistent with the following specific policies of the

Resource Management Plan¹ and related provisions in the Act. For each finding, the policy is first quoted in full, followed by the finding and then the basis for the finding.

UTILITIES AND INFRASTRUCTURE

Policy 3: New sewage treatment facilities (including storage ponds) and new areas for disposal of sewage effluent and sewage sludge shall not be located within the Delta Primary Zone. The Rio Vista project, as described in the adopted Final Environmental Impact Report for such project, and the Ironhouse Sanitary District use of Jersey Island for disposal of treated wastewater and biosolids are exempt from this policy. (Cal. Code Regs., tit. 14, § 200050, subd (c).)

Finding: Consistent.

The sewage treatment and disposal elements of the OSMSP do not constitute “new” sewage treatment and disposal facilities. Rather, they constitute the enhancement of existing facilities.

Basis of Finding:

Existing treatment facilities were primarily used to dispose of agricultural waste generated by the former sugar beet processing plant that once operated at the site. The OSMSP facilities, in contrast, will primarily be used to treat human waste. That distinction, by itself, however, does not make the OSMSP facility “new.” Documentation reviewed by Commission staff, and on file with the Commission, relative to the adoption of regulations governing the siting of new sewage treatment facilities and areas for disposal of sewage effluent and sewage sludge in the Primary Zone do not appear to specifically call out a distinction between agricultural and human waste treatment/effluent discharge.

Further, the STEP system developed as a component of the OSMSP would be located in the same area as the system for the prior use related to the operation of a sugar beet processing plant at the site and is, therefore, a replacement system for the redevelopment of the property, as opposed to a “new” system.

LAND USE

Policy 2: Local government general plans, as defined in Government Code Section 65300 et seq., and zoning codes shall continue to strongly promote agriculture as the primary land use in the Primary Zone; recreation land uses shall be supported in appropriate locations and where the recreation uses do not conflict with agricultural land uses or other beneficial uses, such as waterside habitat. County plans and ordinances may support transfer of development rights, lot splits with no increase in density, and clustering to support long-term agricultural viability and open space values of the Primary Zone. Clustering is intended to support efficient use of agricultural lands, not to support new urban development in the Primary Zone. Local governments shall specifically indicate when, how, and why these options would be allowed in the Primary Zone. (Cal. Code Regs., tit. 14, § 20060, subd. (b).)

Finding: Consistent.

¹The specific policies of the Commission’s Resource Management Plan were adopted pursuant California Code of Regulations, Title 14, section 20030 et. seq.

The OSMSP is consistent with County ordinances and policies that support agriculture.

Basis of Finding:

The agricultural operation and support components of the OSMSP are consistent with the provisions of the Agriculture Element of the County General Plan and with the County Right to Farm Ordinance which support long-term viability of commercial agriculture in the County and the Delta (by incorporation of the Resource Management Plan into the County General Plan).

The clustering of the agricultural facilities, and supporting infrastructure, on the property demonstrates efficient utilization of the area for agricultural purposes while not encroaching on lands zoned for, or currently in, agricultural use.

Policy 3: New residential, recreational, commercial, or industrial development shall ensure that appropriate buffer areas are provided by those proposing new development to prevent conflicts between any proposed use and existing agricultural use. Buffers shall adequately protect integrity of land for existing and future agricultural uses. Buffers may include berms and vegetation, as well as setbacks of 500 to 1,000 feet. (Cal. Code Regs., tit. 14, §20060, subd. (c).)

Finding: Not Consistent.

The proposed buffer between agricultural and urban uses provided in the OSMSP would not provide separation equivalent to or beyond that recommended in Policy 3 and thus would not satisfactorily meet the purposes for which such buffers are called for in that Policy.

Basis of Finding:

The 300-foot buffer provided in the OSMSP to separate the development component of the proposal and agricultural operations on adjacent parcels is significantly less than the 500-foot to 1,000-foot buffer recommended in the Resource Management Plan. It should be noted that the 300-foot buffer is from the first row of vines to the nearest occupied building that is a part of the project.

Pursuant to testimony of the County Agricultural Commissioner, the 300-foot buffer was found to be adequate by the County based on facts associated with vineyard operations (current agricultural use of the adjacent parcel). However, Policy 3 states that buffers shall adequately protect integrity of land not only for *existing* but *future* agricultural uses. There is no certainty that wine grapes will continue to be planted on the adjoining parcel. In that the 300-foot buffer is based on farming practices associated with vineyard operations, including ground rather than aerial spraying, it does not provide assurance that such separation would be sufficient or satisfactory for farming practices that could be conducted on the parcel in the future and that could include aerial spraying. A new crop may require a larger buffer. Policy 3 clearly requires an adequate buffer to allow future agricultural uses unfettered by ag/urban conflicts.

Moreover, although presented as a 300-foot buffer in the OSMSP, in reality, the separation between the project area and the adjacent agricultural parcel is significantly less as 75 feet of the buffer is on the agricultural parcel for which the buffer is to be provided. To the extent that the 75-foot buffer on the agricultural parcel would prevent the use of any portion of that parcel for agricultural uses, it is not consistent with the Land Use Policy 3 requirement that land be protected “for existing and future agricultural uses.” No portion of the agricultural parcel

subject to the buffer would be available for future agricultural uses.

Policy 4: New non-agricultural residential development, if needed, shall be located within the existing Primary Zone communities where support infrastructure and flood protection are already provided. (Cal. Code Regs., tit. 14, § 20060, subd. (d).)

Finding: Not Consistent.

The project involves new non-agricultural residential development in an area that has not been substantially documented with evidence of having support infrastructure and flood protection in place for such use. As such, the OSMSP is not consistent with Land Use Policy 4.

Basis of Finding:

The inconsistency with Land Use Policy 4 is reinforced by reading that Policy along with Public Resources Code section 29765 which lists findings that local governments were required to make prior to the Commission's approval of local government general plan amendments under the Act. Although the section's provisions are not literally applicable, as the Commission has approved the County's amendments, they show legislative intent as to what the Resource Management Plan should achieve, and therefore provide assistance in understanding that Plan's provisions. One finding required under section 29765 is "(f) The development will not expose the public to increased flood hazards."

The OSMSP proposes to convert land zoned Heavy Industrial to a mixed use that includes up to 162 residences. These residences may be constructed even though levee improvements that may be required to provide adequate flood protection may not occur due to economic infeasibility. The project proponent is only required to perform improvements pursuant to the outcome of required studies. However, if the outcome of such studies requires improvements that are economically infeasible there are no assurances that the project proponent or any other entity would perform the needed improvements.

Flood protection for the project area is uncertain and may be below a 100-year level based on the following information: flood protection for the project area is provided by levees on the Sacramento River and Elk Slough; in 1990, the Clarksburg levees were certified and the area was designated as Zone B (commonly referred to as an area having 100-year flood protection) under FEMA Flood Insurance Risk Maps; a re-evaluation conducted after the 1997 flood determined the 100-year flood to be larger than the flood upon which the 1990 determination was based; and the criteria for levee stability and seepage has become more stringent since 1990.

Allowing up to 162 residences to be built within the project area prior to the re-certification of the levees for 100-year protection reduces the level of public health and safety in the area by increasing the number of people at risk of flooding and is inconsistent with Land Use Policy 4.

"Known" uncertainties should be taken into consideration relative to applicability over the life of the project. Although the project is located in an existing community, the adequacy of the flood protection for the community is in a state of uncertainty, ie., FEMA remapping initiative (levee documentation review/decertification of undocumented levees) and FEMA/Corps of Engineers Standards review; DWR mapping initiative (AB 142) and levee coring initiative (Propositions 1E/84); and pending flood protection legislation (SB 5, SB 6, SB 17, SB 59, AB 5, AB 236, AB

4, AB 70 and numerous spot bills).

Finally, there is insufficient evidence that 162 new residences in Clarksburg are needed. This number of units would more than double the size of Clarksburg. According to the August 2004 Draft Environmental Impact Report for this project, Clarksburg had 132 housing units as of 2001. (Draft OSMSP Program Environmental Impact Report, August 2004, p. 4.10-6.) Significantly, according to that report, “the General Plan Housing Element predicts that an additional 27 housing units will be needed to house an additional 68 people by the year 2020.” (Ibid.)

Policy 7: Structures shall be set back from levees and areas which may be needed for future levee expansion. (Cal. Code Regs., tit. 14, § 20060, subd. (g).)

Finding: Consistent.

The OSMSP incorporates standard setback requirements.

Basis of Finding:

The 50-foot setback provided in the OSMSP for levee maintenance is consistent with the minimum existing regulatory requirements and the guidelines developed by the Sacramento River Floodway Corridor Forum.

AGRICULTURE

Policy 4: Local governments shall support long-term viability of commercial agriculture in the Delta because of its economic and environmental importance to the State and local communities. (Cal. Code Regs., tit. 14, § 20070, subd. (d).)

Finding: Consistent.

The OSMSP is consistent with County policies that support viability of commercial agriculture in the County and the Delta.

Basis of Finding:

The agricultural operation and support components of the OSMSP, including operation of a grape crushing facility, winery, and related sale of agricultural products from the winery are consistent with the provisions and policies of the County’s Agriculture Element of the County General Plan which supports long-term viability of commercial agriculture in the County and the Delta (by incorporation of the Resource Management Plan into the County General Plan). Moreover, there is no displacement of land zoned for agriculture as a result of the proposed project.

LEVEES

Policy 1: Local governments shall ensure that Delta levees are maintained to protect human life, to provide flood protection, to protect private and public property, to protect historic structures and communities, to protect riparian and upland habitat, to promote interstate and intrastate commerce, to protect water quality in the State and federal water projects, and to protect recreational use of the Delta area. Delta levee maintenance and rehabilitation shall be given priority over other uses of the levee areas. To the extent levee integrity is not jeopardized, other uses, including support of vegetation for wildlife habitat, shall be allowed. (Cal. Code Regs., tit.

14, § 20100, subd. (a).)

Finding: Consistent.

The OSMSP includes setbacks to assure levee maintenance activities are not compromised.

Basis of Finding:

There is no substantial evidence in the record that the Yolo County approvals will jeopardize the ability of local governments to maintain Delta levees (see Basis of Findings for Land Use Policy 7 and for Levees Policy 2).

Policy 2: If levee guidelines are needed, local governments shall adhere to guidelines for federal and local levee maintenance and construction at a minimum as stipulated in the Flood Hazard Mitigation Plan guidelines developed by California Office of Emergency Services and the Federal Emergency Management Agency in the 1987 agreement, and set longer term goals of meeting Public Law 84-99 (Emergency Rehabilitation of Flood Control Works or Federally Authorized Coastal Protection Works), standards administered by the Corps of Engineers. If vegetation standards are needed, local governments shall adopt the adopted vegetation guidelines, which promote native grasses and limited vegetation on specific areas of the levee. (Cal. Code Regs., tit. 14, § 20100, subd. (b).)

Finding: Consistent.

The OSMSP takes into consideration existing standards and guidelines.

Basis of Finding:

Project approval by the County does not require the adoption of levee or vegetation guidelines. Components of the project do, however, take into consideration the guidelines developed as a part of the Sacramento River Floodway Corridor Forum.

Policy 3: Through flood ordinances based on Flood Emergency Management Act model ordinances, developed by the International Conference of Building Officials and included in the Uniform Building Code, local governments shall carefully and prudently carry out their responsibilities to regulate new construction within flood hazard areas to protect public health, safety, and welfare. Increased flood protection shall not result in densities beyond those allowed under zoning and general plan designations in place on January 1, 1992 for lands in the Primary Zone. (Cal. Code Regs., tit. 14, § 20100, subd. (c).)

Finding: Not Consistent.

The OSMSP includes a change in zoning from Heavy Industrial to a mixed-use that includes 27% of the land being used for moderately high density residential development. By increasing the amount of land zoned residential and placing an intense residential development on it, the project supports an increase in density and a decrease in the level of public safety in the area.

Basis of Finding:

This policy should be interpreted consistent with Public Resource Code sections 29763.5 and 29765. Although those sections are not literally applicable, the first lists findings that the Commission must make before determining that proposed general plan amendments are consistent with the Act, and they express legislative intent as to the purposes of the Act, the

Resource Management Plan and conforming local general plan provisions. One of the findings required by section 29763.5 is as follows: “(g) The general plan, and any development approved or proposed that is consistent with the general plan, will not expose the public to increased flood hazard.” Similarly, section 29765 lists findings that a local government must make where the Commission has adopted its resource management plan or amendments to that plan, but (1) a local government has not yet, pursuant to section 29763, submitted to the Commission general plan amendments that would bring their plans into conformity with the Commission's plan, or (2) a local government has submitted those amendments to the Commission, but the Commission has not approved the amendments. (The Commission adopted its resource management plan on February 23, 1995. It has only adopted one amendment; that amendment became operative on February 27, 1997.) Section 29765 findings include the following: “(f) The development will not expose the public to increased flood hazards.”

The OSMSP includes a change in zoning from Heavy Industrial to a residential use that would result in a density significantly greater than the existing community and greater than the standard density for the county for this type of area, thus reducing the level of public health and safety by inducing growth in the area. Allowing up to 162 residences to be built within the project area prior to re-certification of the levee for 100-year flood protection reduces the level of public health and safety in the area by increasing the number of people at risk of flooding and is inconsistent with Levees Policy 3.

The County has nevertheless asserted that the term “densities” should apply to all uses, not just residential uses. It further asserted, in essence, that the Old Sugar Mill site was zoned for industrial uses on January 1, 1992, and that those uses were dense. The term “densities,” however, is best read as applying to residential uses. The general plan for Clarksburg that was in place on January 1, 1992, for example, refers to densities as residential units per acre. (See Clarksburg General Plan adopted by the Yolo County Board of Supervisors on August 24, 1982. p. 5; see also Table 1, p. 1 of that Plan, referring to “Low Density Residential” and “Residential High Density.”) In contrast, that plan does not use the term densities in discussing uses of industrial areas. (*Ibid.*) Rather, in describing industrial uses, it refers to the intensity of uses by classifying zones as either “Light Industrial” or “Heavy Industrial.” (*Id.*, Table 1, p. 1.) The Resource Management Plan, however, only applies to “density,” not “intensity.” (Unlike the Resource Management Plan, the Act’s definition of “development” includes both terms, indicating that they are different. Public Resources Code section 29723’s definition provides that development means, among other things, “change in the density or intensity of use of land.”)

Finally, this project allows residential development in an area prone to floods (see Basis of Finding for Land Use Policy 4, above). A large number of residential units would expose the public to greater dangers from floods compared to the exposure of industrial workers. While industrial workers would be at the site for limited periods of time, would likely be able to quickly spread the word about imminent danger, and would be, for the most part, mobile, those residing in the proposed residential units would be less likely to receive timely notice of sudden events and would have limited mobility. For example, inhabitants would be exposed to flooding while they are sleeping, and therefore would be less likely to learn about imminent danger. Residential inhabitants would not only have to escape themselves; they would also have material items and family members for which they would be held responsible for evacuating, in addition to simply themselves. Thus, the change in zoning would result in a density increase in both number and

nature.

There is substantial evidence that the project may require increased flood protection. For example, the County's Deputy County Counsel explains that the project "includes preparation of a geotechnical study and, if appropriate, a Flood Protection Plan and the implementation of feasible mitigation." Uncertainties (see Basis of Finding for Land Use Policy 4), together with increasing recognition of the potential influence and impact of natural occurrences such as climate change and earthquake events, elevate the acknowledgement of flood risks to be taken into consideration in the preparation of such a Plan. The significance of providing assurances for public health and safety while not increasing human exposure to such impacts through projects that increase densities through changes in the zoning has become increasingly important and projects that promote such change in densities, such as the OSMSP, are therefore inconsistent with Levees Policy 3.

Policy 4: Local governments shall ensure that existing programs for emergency levee repair should be strengthened and better coordinated between local, State, and federal governments and shall include: interagency agreements and coordination; definition of an emergency; designation of emergency funds; emergency contracting procedures; emergency permitting procedures; and other necessary elements. (Cal. Code Regs., tit. 14, § 20100, subd. (d).)

Finding: Consistent.

The County is a participant in programs to strengthen levee repair and coordination.

Basis of Finding:

As reported by the County Emergency Services Manager, the County is a member of the Delta Emergency Response Team which is involved in the development of tools and a plan to strengthen Delta-wide emergency response.

Policy 5: Local governments shall use their authority to control levee encroachments that are detrimental to levee maintenance. (Cal. Code Regs., tit. 14, § 20100, subd. (e).)

Finding: Consistent.

The OSMSP takes into account the need for levee maintenance.

Basis of Finding:

The habitat and recreation components of the OSMSP take into consideration the need to allow for levee maintenance as the primary consideration when providing amenities for public access to the waterway.

Attachment

A: Staff reports to Commission on November 7, 2006 and January 25, 2007
(w/o exhibits).